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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1944

LEE F. WEILER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 190–200), and the concurring and dissenting opinions (R. 200, 201) are reported at 143 F. (2d) 204.

JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1944 (R. 204), and a petition for rehearing (R. 205–219) was denied July 10, 1944 (R. 225). The petition for a writ of certiorari was filed August 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for perjury, the trial court committed reversible error in refusing to charge, as requested by petitioner, that the Government must establish the falsity of petitioner's statement by the testimony of two independent witnesses or one witness and corroborating circumstances.

2. Whether petitioner's allegedly perjurious testimony was material to the question under inquiry in the proceeding in which such testimony was given.

STATUTE INVOLVED

Section 125 of the Criminal Code (18 U. S. C. 231) provides:

> Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

On May 12, 1943, petitioner was indicted in the District Court of the United States for the Eastern District of Pennsylvania for having testified falsely under oath to certain material matters in a prior criminal proceeding (R. 3a–11a). A verdict of guilty was returned by the jury (R. 104a), and petitioner was sentenced to imprisonment for a term of one year and one day (R. 167a). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed (R. 190–200), with one judge concurring (R. 200–201) and another dissenting (R. 201–204).

The evidence adduced by the Government at the trial may be summarized as follows:

Petitioner, chairman of a local rationing board (R. 119a, 128a), and one Evans, manager of petitioner's garage (R. 80a), were tried in a prior case, in March 1943, in the District Court of the United States for the Eastern District of Pennsylvania (R. 115a) on a charge of making improper sales, keeping false records, and failing to make reports as to new rubber tires and tubes, in violation of regulations issued by the Office of Price Administration (R. 74a, 105a–111a). Petitioner was acquitted (R. 74a).

At the earlier trial petitioner testified under oath concerning his failure to file a quarterly report on or before December 31, 1941, as required

by regulations of the Office of Price Administration (R. 42a, 121a), showing the inventory of tires and tubes in his possession as of December 12, 1941 (R. 111a, 119a). He stated that he did not file such a report because it was due on or before December 31, 1941, and that he did not receive the necessary form until January 5, 1942, when it was too late to be filed (R. 3a–4a; 120a, 121a). Upon being asked whether he filed a report for the following period, due on March 31, 1942, petitioner replied that he did not, explaining that he had not purchased, nor had any tires in stock during such period (R. 4a; 121a–122a). Petitioner was then confronted with a letter sent by him to the United States Petroleum Corporation (hereafter referred to as the Corporation), dated March 24, 1942, in which he stated over his notarized signature that he had purchased 170 tires from the Corporation on March 16, 1942 (R. 5a; 124a, 147a–148a). Petitioner admitted the authenticity of the letter (R. 5a–6a, 124a, 125a–126a, 137a), but denied that he had actually purchased or received the tires (R. 4a, 7a, 8a, 9a; 125a, 129a, 130a, 132a, 134a). In explanation of the transaction and his written admission that he had purchased the tires, petitioner testified in substance that while he ordered the tires, he never received them (R. 125a; Pet. p. 16); that the tires were in fact purchased by one Roatche (R. 8a,

130a–131a), to whom he lent money for the purpose (R. 7a–10a; 128a, 131a, 133a, 134a, 135a); and that he signed the March 24 letter stating that he had purchased the tires from the Corporation in order to accommodate one Sweeney, manager of the Corporation's tire department (R. 41a, 45a), who was involved in the transaction (R. 6a–9a, 126a, 128a, 130a–132a, 141a, 142a, 146a).[1]

At the trial in the case at bar, Sweeney testified that in March 1942 the Corporation was liquidating its tire department (R. 41a); that he persuaded petitioner to purchase the tires in question (R. 41a–42a); that they agreed as to the price and petitioner gave him a written order for the tires (R. 43a, 49a–50a, 58a, 147a); and that petitioner stated he would send his truck for them (R. 47a). Sweeney testified further that subsequently Evans, the manager of petitioner's garage (R. 80a), called for the tires in a truck which had been used previously by petitioner's employees, received the tires, and paid for them in cash (R. 43a, 47a, 48a). He identified an official record of the Corporation showing the sale of the tires to petitioner's concern, the Brewerytown Garage (R. 27a, 43a, 58a–59a, 148a), and categorically denied that he (Sweeney) purchased the tires or invested any money in them, that he received the

[1] The full testimony which petitioner gave in this respect is set forth in the indictment (R. 3a–10a) and in Government's Exhibit 2 (R. 116a–146a).

tires, or that the transaction was handled by him in any way except in his official capacity and on behalf of the Corporation (R. 44a, 45a, 50a–51a). Roatche, a friend of Sweeney (R. 47a, 62a), testified that Sweeney had informed him of the proposed liquidation of the Corporation's tire department and asked him whether he knew of "a legal outlet" for the tires, whereupon Roatche mentioned petitioner (R. 60a); that Sweeney and Roatche visited petitioner, and negotiations between the parties culminated in petitioner's purchase of the tires (R. 60a, 61a); that subsequently Roatche rode with Evans on the truck from the Brewerytown Garage to the Corporation's premises (R. 62a, 64a), was present at the receipt of the tires by Evans (R. 60a, 61a, 62a), helped him load them on the truck (R. 62a), and drove with Evans back to Philadelphia (R. 60a). Roatche testified also that he did not purchase the tires (R. 59a, 61a); that he received no loan or money from anyone for their purchase (R. 60a, 61a); and that the tires were not delivered to him (R. 60a, 64a).

Gabel, president of the Corporation (R. 26a), testified that, upon learning of the sale of the tires to petitioner, he sent for petitioner and, stating that he understood the sale and delivery of the tires already had been made to him (R. 27a–28a, 30a; see also 33a), asked petitioner for a letter on petitioner's stationery to the effect that petitioner

"was competent under the Act to buy those tires" (R. 27–28a; see also 30a, 31a). Gabel threatened to report the transaction to the Office of Price Administration or recall the tires unless the letter were received (R. 28a), and subsequently sent a notary to petitioner's office to obtain such a letter (R. 28a). Oates, the office manager of the Corporation, a notary public (R. 33a), testified that he witnessed petitioner affix his signature to the letter of March 24, which he then notarized (R. 34a–35a).

ARGUMENT

1. Petitioner asserts that the trial court committed reversible error in refusing to instruct the jury that the falsity of the statements made by petitioner in the earlier proceeding must be established by the testimony of two independent witnesses or one witness and corroborating circumstances (Pet. 6–7, 8–9, 12–16). We submit that this contention is without merit.

It may be conceded that the requested instruction embodied the rule generally followed in the federal courts in perjury cases. See *Hammer* v. *United States*, 271 U. S. 620, 626–627; Wigmore, *Evidence* (3d ed.), Vol. VII, Secs. 2030–2034. Pretermitting the question whether this rule should be modified to permit a conviction to be based upon the testimony of one witness, as was urged in the Government's brief in *Goins* v. *United States*, 306 U. S. 622 (Brief, pp. 13–14, 16–40),

the issue here is whether petitioner was prejudiced by the trial court's refusal to give the jury the requested instruction. It is clear, we think, that here, as in the *Goins* case, the trial court's failure to give such an instruction could not have prejudiced petitioner.

The allegedly perjurious testimony included not only petitioner's assertion that he did not file the March 1942 quarterly report because he had not purchased any tires during that month, but also his explanation of the transaction referred to in his letter of March 24 (R. 147a–148a). Witnesses Sweeney and Roatche testified to the utter falsity of petitioner's statements at the earlier trial. Their testimony was corroborated by that of Gabel and Oates (*supra*, pp. 6–7). Moreover, the signed and notarized statement that he had purchased the tires in March 1942, which was introduced in evidence, constituted a documentary writing emanating from petitioner himself. In finding petitioner guilty, the jury must have disbelieved petitioner's testimony that he filed no report in March because he had no tires and purchased none; in so concluding, the jury necessarily must have found petitioner's explanation of the transaction also to be false. Since the testimony of Sweeney and Roatche coincided as to those material matters, and was reinforced by petitioner's written, signed statement and by the corporation's record, it is plain that the jury credited their testimony, the corporation's record,

petitioner's written statement, as well as the testimony of witnesses Gabel and Oates concerning the statement.

Not only did the Government produce more than the minimum quantum of evidence necessary to satisfy the rule, but in view of the introduction of the written statement signed by petitioner, the Government probably could have predicated its entire case upon that document alone. See *United States* v. *Wood*, 14 Pet. 430. It is inconceivable that the jury could have believed only Sweeney or Roatche and not the other two, or could have accepted the testimony either of Gabel or Oates without believing the other. Even assuming, *arguendo*, that only Sweeney or Roatche was believed, their testimony was corroborated by the letter of March 24. This evidence was well within the requirements of the rule. Clearly, therefore, petitioner was not prejudiced by the trial court's refusal to give the requested instruction. Cf. *Goins* v. *United States, supra; O'Leary* v. *United States*, 158 Fed. 796 (C. C. A. 1); *Pawley* v. *United States*, 47 F. (2d) 1024 (C. C. A. 9).

2. Petitioner asserts (Pet. 8, 9, 12, 18–19) that the testimony forming the basis for the perjury indictment was not material to the earlier trial, and that, consequently, the perjury indictment was not well grounded. There is no merit to this contention. The question of materiality was for the trial court. *Sinclair* v. *United States*, 279 U. S. 263, 298; *Travis* v. *United States*, 123 F.

(2d) 268, 270 (C. C. A. 10), and cases cited. Both the trial court and the circuit court of appeals upon review (R. 190–193) concluded that the testimony in question was material. Specifically, petitioner's testimony as to his failure to file the March 1942 report and his explanation for his failure to file that report, as well as his contradiction of the statements in his letter of March 24, were given in connection with his explanation of his failure to file the December 1941 report, which was a matter wholly within his knowledge requiring the jury to place reliance upon his testimony, as it apparently did in acquitting him. While the March 1942 incidents were not directly within the scope of the indictment, they tended to throw light upon petitioner's December 1941 activities and had a direct and probably crucial bearing upon his credibility and the truth of his advanced explanations and justifications for the prior activities for which he was indicted. The testimony was thus plainly material. See, e. g., *Goins* v. *United States*, 99 F. (2d) 147 (C. C. A. 4), certiorari granted, 306 U. S. 623, certiorari dismissed, 306 U. S. 622; *Blackmon* v. *United States*, 108 F. (2d) 572, 573 (C. C. A. 5); *Claiborne* v. *United States*, 77 F. (2d) 682 (C. C. A. 8); *Luse* v. *United States*, 64 F. (2d) 776, 777 (C. C. A. 9); *United States* v. *McGovern*, 60 F. (2d) 880 (C. C. A. 2); *Carroll* v. *United States*, 16 F. (2d) 951 (C. C. A. 2); *United States* v. *Shinn*, 14 Fed. 447, 453 (C. C. D. Ore. 1882);

Williams v. *United States*, 3 F. (2d) 129 (C. C. A. 8); *Leyer* v. *United States*, 183 Fed. 102, 105 (C. C. A. 2); *United States* v. *Hampton*, 101 Fed. 714 (C. C. A. 4); *United States* v. *Singleton*, 54 Fed. 488 (S. D. Ala 1892); *United States* v. *Hall*, 44 Fed. 864 (S. D. Ga. 1890); *United States* v. *Landsberg*, 23 Fed. 585 (C. C. S. D. N. Y. 1882); *United States* v. *Garvett*, 35 F. Supp. 644 (E. D. Mich. 1940).

3. Petitioner complains that the indictment is based not only upon the "contradictory statements of the defendant, but also the qualifications and explanations accompanying them" (Pet. 9), relying upon an alleged conflict with *Fotie* v. *United States*, 137 F. (2d) 831, 840 (Pet. 9, 16–18). Petitioner apparently misconstrues the ruling in the *Fotie* case, which merely held that the evidence there introduced was insufficient to sustain the indictment (see 137 F. (2d) at 840).[2] In the case at bar, petitioner's so-called qualifications and explanations of his March 24 written statement as to his purchase of the tires were

[2] In that case, based upon an indictment charging perjury in the course of a hearing on a private bill to legalize the defendant's entry into the United States, the court stated (137 F. (2d) at 840):

"* * * there is no evidence to contradict appellant's testimony in this record. * * * The only evidence * * * is the proof of prior inconsistent admissions and contradictory statements of the appellant. But in proving these admissions, the Government also proved the qualifications and explanations which accompanied the great majority of them * * *."

false, and themselves form part of the basis for the indictment (R. 3a–10a; *supra*, pp. 3–5). Those qualifications and explanations were, consequently, properly included in the indictment. Cf. *Travis* v. *United States*, 123 F. (2d) 268 (C. C. A. 10), and cases cited; *Woolley* v. *United States*, 97 F. (2d) 258 (C. C. A. 9); *Claiborne* v. *United States*, 77 F. (2d) 682 (C. C. A. 8); *Berry* v. *United States*, 259 Fed. 203 (C. C. A. 9)). It is settled, of course, that the several assignments of perjury may be set forth in a single count and that conviction will be sustained if any one of such assignments is proved. *United States* v. *Mascuch*, 111 F. (2d) 602 (C. C. A. 2), certiorari denied, 311 U. S. 650; *United States* v. *Otto*, 54 F. (2d) 277, 279–280 (C. C. A. 2); *Claiborne* v. *United States*, 77 F. (2d) 682, 687, 691–692 (C. C. A. 8); *Clayton* v. *United States*, 284 Fed. 537, 539 (C. C. A. 4); Wharton's *Criminal Law* (12th ed.), Vol. II, Sec. 1567.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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